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JUN 13

No. 00-1709

IN THE

Supreme Court of the United States

DEBORAH RICE-LAMAR,

Petitioner,

v.

CITY OF FORT LAUDERDALE, a municipality, and GEORGE HANBURY, PETE WITSCHEN, BRUCE LARKIN, and JOHN PANOCH, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

WHETHER THE ELEVENTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S ORDER GRANTING SUMMARY JUDGMENT TO RESPONDENTS ON THE GROUNDS THAT PETITIONER'S FIRST AMENDMENT RIGHTS WERE NOT VIOLATED WHEN SHE WAS DISMISSED FOR ADMITTEDLY REFUSING TO COMPLY WITH HER SUPERVISORS' DIRECTIVES TO DELETE HER PERSONAL OPINIONS AND COMMENTARY FROM AN OFFICIAL CITY AFFIRMATIVE ACTION REPORT.

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RESTATEMENT OF THE CASE

Pursuant to Supreme Court Rules 15.3 and 24.2, Respondents state that they are not satisfied with the Petitioner's Statement of the Case ("Statement") included in her Petition for Writ of Certiorari ("Petition"). Petitioner's Statement contains argument, conclusory allegations which were not in the record, and alleged facts which are immaterial and insufficient to avoid summary judgment. Further, Petitioner's Statement contains misstatements of record evidence and testimony. Respondents therefore adopt and incorporate by reference herein the facts set forth in the Opinions of the United States Eleventh Circuit Court of Appeals (Appendix A to the Petition, pp. 1a-17a) and the United States District Court for the Southern District of Florida (Appendix B to the Petition, pp. 18a-35a) as a more complete, precise, and accurate statement of the case than that offered by Petitioner. A summary of the material facts and procedural history in this case is set forth below.

A. Summary Of Pertinent Record Facts.

Petitioner, Deborah Lamar ("Lamar"), is an African American female who was employed by the City of Fort Lauderdale, Florida, as its Affirmative Action Specialist from June 20, 1988, through her dismissal on October 21, 1996. In that division level management position, she was responsible for planning, directing, and implementing a variety of internal equal employment opportunity and affirmative action programs, and preparing annual affirmative action reports (annual summaries of the progress being made towards the goals established in the City's Affirmative Action Plan). Lamar's immediate supervisor was City Personnel Manager, John Panoch. Panoch reported to

the Director of Administrative Services, Bruce Larkin, who reported to the Assistant City Manager, Pete Witschen, and, ultimately, the City Manager, George Hanbury. All of Lamar's work was subject to review by Panoch and Larkin, and all communications outside the Personnel Department were to go through Panoch and/or Larkin first.

On February 1, 1994, Panoch gave Lamar a deadline of April 29, 1994 to complete the statistical analysis for the City's 1994 Affirmative Action Report. Lamar did not meet that deadline. Instead, subsequent to the date it was due, Lamar finally turned in her draft of the 1994 Affirmative Action Report which contained statistics, analysis, and a narrative section expressing her view that the City should take steps to address the high percentage of juvenile crime within the City, arguing that because these juveniles were the future work force, failure to act would affect the City because minority candidates for police officer positions would not be able to pass the background investigation. Both Larkin and Panoch responded that they did not believe this was an issue to be addressed by Administrative Services or Personnel but rather, the City's Police Department and the educational system. Panoch and Larkin determined that only the statistics and methodology were necessary for purposes of the Affirmative Action Report, and therefore asked Lamar to revise the report accordingly. Lamar was given a new completion date of December 2, 1994; however, she failed to meet that deadline.

On January 19, 1995, Lamar received a written reprimand from Panoch, for, inter alia: (1) failing to complete the 1994 Affirmative Action Report by the revised due date of December 2, 1994; and (2) failing to complete the Minority/Women's Business Enterprise Directory

(hereinafter "MBE/WBE Directory") which was due December 22, 1994. Lamar was then given until January 31, 1995 to complete both projects. Lamar did not meet this subsequent deadline and received a one-day suspension (for records purposes only).

Because the 1994 Affirmative Action Report was never completed, Lamar was directed to prepare a 1995 report instead. Subsequently, she submitted her draft of the City's 1995 Affirmative Action Report, which contained a philosophical narrative discussion regarding the direction Lamar believed affirmative action should take in the next century; the report itself contained very few numbers. Panoch instructed Lamar to delete the personal commentary and to provide only statistics in the report.

On March 24, 1995, Lamar forwarded her final draft of the 1995 Report to Panoch, which still contained her personal commentary. This version was never sent to the City Commission. Instead, using the numbers provided by Lamar, Panoch prepared his own version of the 1995 Report which omitted Lamar's personal narrative. The new version was provided to the City Commission on April 5, 1995. Lamar disagreed with the omission of her opinions and commentary, but ultimately elected to sign the report. Because Lamar had failed to timely produce the 1995 Affirmative Action Report as directed by the revised deadline of March 1995, Lamar received a five day suspension, which was reduced by Larkin in the City's grievance process to a four day suspension for records purposes only.

In February 1996, Clifton McCree, a mentally deranged former City employee, murdered five City workers, seriously wounded another, and then committed suicide. Although she had never even met McCree, Lamar was of the opinion that

his homicidal outburst was caused by racism. In the aftermath of the McCree tragedy, the City hired Crisis Management International, Inc. ("CMI") to provide psychological services to its employees. During this time period, various meetings were held related to the City's response to the shooting incident. While Lamar was generally excluded from the crisis management meetings, she would, at times, invite herself to those meetings. Lamar was eventually told that it would be insubordination for her to speak to anyone at CMI without first directing her statements through her immediate supervisors.

On June 19, 1996, Lamar presented her proposed draft of the City's 1996 Affirmative Action Report at a City department head meeting. As with the 1995 Affirmative Action Report, Lamar included her own personal commentary and conclusions in the report. In particular, the narrative section of this draft included Lamar's personal commentary that "we are still a City plagued with racism, glass ceilings for women and brick walls for people of color, a tolerance for the perceptions of unfairness and a proverbial silence about it all." Lamar perceived that senior management was not receptive to her proposed report because each of the named individual defendants expressed reservations about its content and requested that she make changes to the report. Specifically, Lamar was directed to remove her personal commentary and opinions and to instead draft a report that focused on the statistical data collected on minority and female representation in the City's workforce. Lamar refused to make the changes.

On July 22, 1996, Lamar left a revised copy of her proposed 1996 Affirmative Action Report in the offices of Panoch and Larkin, with the message that it was ready for

printing and distribution. The revised draft still contained most of the personal commentary Lamar had been directed to omit. On July 26, 1996, Larkin met with Lamar and offered her the opportunity to resign. On July 29, 1996, without ever having it reviewed and approved by Panoch or Larkin, Lamar distributed her version of the 1996 Affirmative Action Report to City Manager Hanbury and all but one of the other department heads. Lamar also distributed her unreviewed and unapproved draft of the MBE/WBE Directory (which was originally due December 22, 1994) on July 29, 1996.

On August 5, 1996, Lamar responded in writing to Larkin's request for her resignation. She refused to resign and attempted to blame the delay in producing the required reports on computer problems. She also asserted that Larkin and Panoch were harassing her in an attempt to have her suppress her affirmative action analysis in her reports. On August 11, 1996, Lamar was notified of possible disciplinary action for incompetent performance based, inter alia, upon the unauthorized distribution of her version of the City's 1996 Affirmative Action Report (without the revisions directed by her supervisors) and her repeated failure to meet work assignment deadlines. The City Manager ultimately approved Lamar's dismissal effective October 21, 1996.

B. Summary Of Procedural History.

On August 19, 1997, Lamar filed suit against the City and her supervisors, individually, asserting that she had been discriminated against on account of her race and gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Fourteenth Amendment to the United States Constitution (brought through 42 U.S.C. § 1983). Lamar further asserted that Respondents

discriminated against her on account of her race in violation of 42 U.S.C. § 1981 (via Section 1983). In addition, Lamar asserted a claim under the First Amendment (via Section 1983), alleging that she was retaliated against because of alleged protected speech. Finally, Lamar asserted a conspiracy claim under 42 U.S.C. § 1985(3).

In response to Lamar's allegations, and throughout this litigation (including summary judgment), Respondents maintained that Lamar was dismissed due to her persistent performance deficiencies, including, inter alia, her *admitted* refusal to comply with her supervisors' instructions, repeated failure to meet deadlines for completing work assignments, and unauthorized distribution of her version of the City's 1996 Affirmative Action Report.

By order dated November 25, 1998, the district court entered summary judgment in favor of Respondents on all counts, noting that in so doing, it had "taken the material facts from [Lamar's] own version of the facts contained in her opposition briefs and from the undisputed facts contained in the Joint Pretrial Stipulation." *See* Petition, p. 36a n.1. As to the First Amendment claim, the district court held that, while Lamar's expression did address matters of public concern (which Lamar honestly believed to be the truth), the City's interests in preserving the efficiency of government services outweighed Lamar's interests. Specifically, the district court ruled that "[w]hile Lamar may have had a First Amendment right to make her opinions on racial discrimination known to the public, she was not entitled to do so in a report prepared for the City that would also represent the City's own position," concluding that "the manner in which [Lamar] chose to make her views known was certainly disruptive." *See* Petition, pp. 28a, 30a. The district court reasoned that:

> The Affirmative Action Report, while initially prepared by Lamar, was the City's report. Lamar's supervisors specifically requested that she make changes to the report. At that point, Lamar had two choices. First, she could make the changes against her will and seek alternative means for espousing her own personal views. Alternatively, Lamar could refuse to make the changes and suffer the consequences, including charges of insubordination. It is undisputed that Lamar chose the latter, and consequently, it is undisputed that Lamar's actions constituted insubordination.

See Petition, p. 29a (citing *Hankard v. Town of Avon*, 126 F.3d 418, 422 (2d Cir. 1997)).

Lamar's subsequent Motion to Alter or Amend Judgment, was denied by the district court on July 30, 1999. In that order, the district court stated:

> [w]hat Lamar still fails to recognize is that the Affirmative Action Reports were the City's own reports, and not Lamar's, and the City had a right to not publish Lamar's own views in the reports. Even if Lamar had been correct as to her opinions regarding discrimination at the City, the persons ultimately responsible for the content of these reports (not Lamar), had the ultimate right to decide what to include, and not include, in these reports. The problem with Lamar's argument is not with the content of her opinions, but the manner in which Lamar chose to express those opinions. Lamar certainly could have expressed

her views using alternative channels; however, she chose to insist that her disputed views remain in the Affirmative Action Report.

In her complaint (and two subsequent amended complaints), Lamar never asserted a claim for retaliation under Title VII. Instead, on February 1, 1999, more than two months after the district court's order granting summary judgment and several months after the deadline for amending the pleadings, Lamar for the first time sought leave to amend to assert a Title VII retaliation claim. By order dated July 30, 1999, the district court denied Lamar's motion as untimely and further found that amendment would be futile in that Lamar's admitted failure to comply with the directives of her superiors was a legitimate, non-pretextual reason for the City's decision to terminate her employment. The district court's denial of Lamar's motion to amend was not even mentioned in the instant Petition and has not been challenged before this Court as a basis for invoking certiorari review.

Lamar filed her Notice of Appeal on August 12, 1999. On appeal, the Eleventh Circuit assumed without deciding that Lamar's expression constituted speech on a matter of public concern. The court noted, however, that "[o]ur notice of the fact that the Affirmative Action Report may not be accurately characterized as *Rice-Lamar's speech (as opposed to the City's* speech*)* heightens our doubt that the speech at issue should receive any First Amendment protection." *See* Petition, p. 16a n.10 (emphasis in original). The Eleventh Circuit went on to affirm the district court's order, holding that "[b]ecause Rice-Lamar refused to alter the report in accordance with her superiors' instructions, any First Amendment interest she may have had in publishing her views is outweighed by the City's interest in producing an

official document that conformed to the City's expectations." *See* Petition, p. 9a. The court therefore concluded that Lamar was lawfully dismissed, reasoning that she was given a direct order to amend the Affirmative Action Report to delete her "dramatic personal commentary," that she flatly refused to perform that lawful task (which was within the scope of her duties), and that " '[s]uch refusal to abide by a valid order is closely connected with, and can be classified as insubordination.' " *See* Petition, pp. 2a, 9a. Lamar's subsequent Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 12, 2001.

C. Additional Misstatements In The Petition For Writ Of Certiorari.

Pursuant to Supreme Court Rule 15, which places an affirmative duty upon Respondents to "address any perceived misstatements of fact or law set forth in the petition that bears on what issues properly would be before the Court if certiorari were granted," Respondents point out the following additional misstatements set forth in the Petition:

Beginning with the last paragraph on page 8 of the Petition and concluding with the end of the statement of facts on page 9 (and reasserted at the end of page 24 through the end of page 25), Lamar has included matters that were not in the record before either the district court or the Eleventh Circuit. Indeed, many of the alleged facts recited therein occurred, if at all, long after Lamar's dismissal and therefore have no relevance whatsoever to the determination of whether certiorari should be granted in this case. It is noteworthy that Lamar's attempt to influence the Eleventh Circuit Court of Appeal with such irrelevant and inflammatory allegations led the appellate court to strike the last section of Lamar's

petition for rehearing. Similarly, this Court should strike or otherwise disregard such impertinent and improper surplusage.

On page 6 of her Petition, Lamar states that she "nevertheless complied with her superiors' directives and altered the [1995] report." Further, on page 24, Lamar states "[t]he City Managers, in an attempt to add legitimacy to the [1995] report that was eventually submitted to the City Commissioners, stated falsely that the statistics [in the 1995 Report] were prepared by Lamar." These statements, however, are flatly contradicted by the record evidence developed in the district court. Specifically, the record as to the 1995 Affirmative Action Report established that Lamar prepared the statistical information for that report and that, when she refused to delete her personal philosophical narrative, her supervisor used Lamar's statistics to prepare a separate report for distribution to senior management and the City Commission. Although Lamar disagreed with the deletion of her narrative portion from the 1995 Report, she nevertheless elected to sign that report.

Throughout her Petition, Lamar states her opinion that the reports "did not reveal the extent of the City's discrimination" and implies that City officials were attempting to "cover up" unlawful employment practices. The undisputed record facts establish, however, that Lamar's superiors merely directed Lamar to prepare a statistical report (as opposed to a narrative report) -- in essence, a snapshot of where the City was with respect to its affirmative action goals; and that those statistics, as developed by Lamar, were accurately stated in the final reports. Other than Lamar's personal opinion, no evidence was presented below to establish that the statistics were "distorted" in any manner. *See* Petition, p. 7.

Based upon an e-mail discussion, Lamar accuses Panoch and Larkin of attempting to "gag" her after she voiced her view that racism was a cause of the McCree tragedy. This is a blatant misstatement of the record. The undisputed evidence shows that the "gag" e-mail exchange was prompted when Lamar went to Assistant City Manager Witschen directly on March 29, 1996 to seek approval for her attendance at a seminar. Witschen knew nothing about the request and expressed his annoyance to Larkin regarding Lamar's attempt to bypass her supervisors. In response, Larkin and Panoch reiterated to Lamar the chain-of-command policy and directed that, except in certain specified instances, all communications with senior management were to first go through Panoch and Larkin. This corporate communication policy had been a part of Lamar's work plan since at least 1992, and everyone in Administrative Services was subject to the same policy.

On page 7 of her Petition, Lamar states that she proposed to include a reference to a Police Department incident in her draft of the City's 1996 Affirmative Action Report. Lamar has failed to disclose that the record evidence below established that the incident involved a City Police Officer who attended an allegedly racist function in another state during off duty hours and, as a result, was terminated from City employment.

Finally, throughout her Petition, Lamar refers to the Affirmative Action Reports as *her* reports. As established by the undisputed record facts and recognized by the district court and the Eleventh Circuit, however, those reports were official City reports that were prepared on behalf of the City, not Lamar, and which represented the City's position, not Lamar's. Specifically, the Eleventh Circuit ruled that:

> Contrary to Rice-Lamar's perception, her job with the City did not involve utilizing the City's resources to crusade for her personal vision of social justice; her job was to follow her supervisors' lawful instructions . . .
>
> * * *
>
> Civil servants cannot cry foul when they attempt to use their government employers as stage dummies, and are then disciplined for it.

See Petition, pp. 9a-10a

REASONS FOR DENYING THE WRIT

A. The Petition For Writ Of Certiorari Should Be Denied Because The Sixth Circuit's Decision In *Johnson v. Univ. of Cincinnati* Is Factually Distinguishable. Hence, No Conflict Exists That Would Warrant Certiorari Review.

Lamar first argues that certiorari should be granted because the Eleventh Circuit's opinion is allegedly "diametrically opposite" to the Sixth Circuit's opinion in *Johnson v. Univ. of Cincinnati*, 215 F.3d 561 (6th Cir.), *cert. denied*, 121 S. Ct. 657 (2000). Lamar asserts that *Johnson* is "virtually 'on all fours' with the instant case," as to her issue of whether "an Affirmative Action/EEO Officer can report discrimination to their (sic) superiors without fear of repercussion." *Johnson* is readily distinguishable from the case sub judice and, therefore, no conflict sufficient to warrant certiorari review exists.

In *Johnson*, the plaintiff was a senior management official in charge of the university's affirmative action program who reported directly to the university's president. He distributed a memorandum in 1994 to the university's cabinet questioning the university's commitment to equal employment opportunities. Subsequently, in 1995, he sent another memorandum, this time to another senior management official, again questioning the university's commitment to equal employment opportunities. During this time period, he was never advised of any performance deficiencies.

In December 1995, the plaintiff filed a charge of race discrimination and retaliation under Title VII with the EEOC, alleging, inter alia, that he was being prevented from fully participating in human resource matters in retaliation for objecting to what he perceived to be discriminatory hiring practices. One month later, the plaintiff was notified for the first time of certain performance deficiencies. When he subsequently disputed the criticisms of his work performance, he was fired. 215 F.3d at 568-70. The plaintiff thereafter filed suit for race and national origin discrimination in violation of 42 U.S.C. § 1981 and Title VII, retaliation in violation of Title VII, and violation of his free speech rights under the First Amendment, brought via 42 U.S.C. § 1983. *Id.* at 566.

The court in *Johnson* first held that the plaintiff stated a claim under Section 1981 and Title VII for race discrimination based upon his advocacy on behalf of women and minorities and further held that the plaintiff's advocacy for nondiscriminatory hiring practices was protected conduct under Title VII's anti-retaliation provision. The court then concluded that, because the plaintiff had presented evidence that his job performance was criticized immediately after his

filing of the EEOC charge and that he was shortly thereafter terminated, he had presented a factual issue for the jury as to pretext and, hence, summary judgment for defendants had been improvidently granted. *Id.* at 581-83. As to the First Amendment claim, the court held that the university's "proclaimed need to run an efficient organization" did not outweigh the plaintiff's right to speak. The court reasoned that the plaintiff's speech advanced the university's affirmative action goals instead of undermining those goals. *Id.* at 585.

A number of critical facts readily distinguish *Johnson* from the case sub judice. First, *Johnson* did not hold (as Lamar is essentially arguing here) that affirmative action/ EEO officers have an unfettered right to speak out in any manner they see fit -- including incorporating their own opinions and "dramatic personal commentary" into their employer's official reports. Indeed, in the instant case, the crux of Lamar's complaint is that her "attempt to publish *her* report was a substantial motivating factor in her discharge, as the timing of her discharge and immediate expulsion from the City showed that her superiors want to squelch her from communicating her opinions further." *See* Petition, p. 22a (emphasis added). As the record evidence established and the lower courts found, however, unlike the plaintiff in *Johnson*, Lamar did not try to "speak out" through personal memoranda to other division heads or City management. Instead, she insisted upon exerting complete editorial control over the content of an official City document. As the district court stated, "[w]hile Lamar may have had a First Amendment right to make her opinions on racial discrimination known to the public, she was not entitled to do so in a report prepared for the City that would also represent the City's own position." *See* Petition, p. 30a.

Indeed, in comparing herself to the plaintiff in *Johnson*, Lamar has missed the critical distinction: the report being prepared here was the *City's* report -- not *her* report. Thus, the City had "a significant interest in regulating the speech to make certain it was presented in the most informative and helpful manner." *Johnson*, 215 F.3d at 588 (Kennedy, J., dissenting). To the contrary, the *Johnson* plaintiff prepared his own internal memorandum; he did not try to include his "dramatic personal commentary" in an official university document.[1]

Second, unlike the instant case, *Johnson* did not involve blatant, repeated failures to meet deadlines and comply with senior management directives. Here, the record facts establish that Lamar was directed by her superiors to prepare a specific report on their (i.e., the City's) behalf, subject to their review, by a specific date and in a specific format. Lamar *repeatedly* failed to meet the established deadlines and refused to modify the content of the report as directed. As a result, she received progressive discipline over a period of approximately eighteen (18) months until she was ultimately dismissed from City employment. Thus, this is not a case like *Johnson* where the employee filed an EEOC charge and then, out of the blue, his performance was criticized with no prior warning and he was terminated within a month.

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1. Further, because the document Lamar sought to publish in direct defiance of her superiors' directives was an official City document for which Lamar's superiors had ultimate responsibility, those superiors could lawfully direct her to omit her unsubstantiated opinions and conclusions from the City's Affirmative Action Report. As this Court has previously noted, reasonable restrictions on the manner, time and place of protected speech do not violate the Constitution. *See Connick v. Myers*, 461 U.S. 138, 152 (1983); *Waters v. Churchill*, 511 U.S. 661, 698 (1994) (Stevens, J., dissenting).

Finally, throughout this case, Lamar maintained that she was discriminated against in violation of Title VII and Section 1981 because of *her* race and *her* gender -- not for alleged advocacy on behalf of other minority employees. Lamar's untimely and futile attempt to assert a Title VII retaliation claim after summary judgment had already been entered against her was apparently an afterthought. Accordingly, the Eleventh Circuit's decision in this case does not conflict with *Johnson* because Lamar's case was based upon significantly different facts. The Petition should therefore be summarily denied.

B. The Petition For Writ Of Certiorari Should Be Denied Because The Eleventh Circuit's Decision Does Not Abrogate Title VII Rights.

Lamar next argues that the Eleventh Circuit's decision, "in abrogation of Title VII, forecloses any opposition to discrimination by a management employee with affirmative action responsibilities." *See* Petition, p. 17. Lamar's argument in this regard is disingenuous because this simply is not and was not ever a Title VII retaliation case. The Eleventh Circuit's holding as to Lamar's speech was predicated solely on First Amendment grounds. Indeed, Lamar did not assert in either her original or amended complaints in the district court any claim for retaliation under Title VII based upon her speech and/or advocacy on behalf of minorities. Rather, Lamar's Title VII claims were premised solely upon alleged discrimination on account of *her own* race and gender. Although Lamar belatedly sought to amend her complaint a third time to add a Title VII retaliation claim after summary judgment had already been entered against her, the request was denied as untimely and futile. Petitioner does not assert denial of her motion to amend as error meriting certiorari

review. Nor does Petitioner assert rejection of her race and gender bias claims as a basis for seeking review by this Court.

Further, the Eleventh Circuit's opinion did not "foreclose" Lamar's First Amendment rights by any stretch of the imagination. Instead, the Eleventh Circuit correctly held that the City had a legitimate right to control the content of its own official documents and concluded that Lamar was terminated not for what she said, but rather, for disobeying the lawful directives of her superiors. Nothing in that opinion would prevent Lamar from sending memoranda to her superiors stating her concerns or making recommendations, through the chain-of-command, for suggested improvements. Lamar, speaking as a citizen, could have addressed her concerns privately with the City Commissioners, albeit after complying with the City's chain-of-command (corporate communication) policy. *See* Petition, p. 10a

Finally, contrary to Lamar's argument, the Eleventh Circuit's opinion herein can be easily reconciled with the prior appellate decisions in *Hamm v. Members of Bd. of Regents*, 708 F.2d 647 (11th Cir. 1983), and *Whatley v. Metro Atlanta Rapid Transit Auth.*, 632 F.2d 1325 (5th Cir. 1980). In *Hamm*, a retaliation case brought under Title VII and the First Amendment, an EEO specialist was terminated after, inter alia, "going public" to the campus newspaper with an internal investigative report without prior approval of her superiors. The Eleventh Circuit upheld the termination, reasoning that:

> [the plaintiff's] role was to aid and assist her superior, the vice president for administration, in resolving problems of discrimination facing [the

> employer's] non-academic personnel. Although she may have been an adviser, expediter, or go-between, the record is clear that she had no ultimate decision-making authority. That authority, and the concomitant responsibility, was vested in her supervisor. The record demonstrates that, despite repeated admonitions as to the procedures her supervisors wished her to follow in resolving discrimination complaints, the plaintiff persisted in "going public" rather than first going through her supervisor, the person with the ultimate decision-making authority. The university placed the plaintiff in a position which required loyalty to her supervisor and expected her to perform her assigned duties within the framework established by the university.

708 F.2d at 653. The Eleventh Circuit thus concluded that where an employee chooses to "work outside the framework" established by the employer for the position, the employer may legally "remove [the] employee . . . based on the manner in which the employee undertakes his or her duties." *Id.* at 654.

In *Whatley*, a Title VII retaliation case, the plaintiff served as the Director of Compliance in the defendant's EEO office. In that position, the plaintiff was subordinate to and was required to report to the Assistant General Manager for EEO matters. 632 F.2d at 1326. During the course of his employment with the defendant, the plaintiff violated normal reporting procedures and began to assume duties beyond his job description. On a number of occasions, and despite having been repeatedly advised of the proper reporting procedures, the plaintiff, without his supervisor's consent or knowledge,

made derogatory remarks about the employer's EEO affairs and the EEO office to persons outside the office, including the press. Subsequently, the plaintiff failed to follow internal procedures regarding the reporting and investigation of employee grievances and, as a result, he was terminated. *Id.* at 1327. The Fifth Circuit upheld the termination, finding that the employee had failed to follow prescribed administrative procedures, noting that "it was not the fact that appellant filed a complaint for [another employee] but the manner in which he did so." The court in *Whatley* reasoned that, in addition to his refusal to follow instructions from his supervisor, the plaintiff's "[failure] to follow prescribed administrative procedures is not a statutorily protected activity. Title VII cannot be held to immunize an employee from all consequences of his behavior merely because part of his job happens to require the handling of discrimination complaints." *Id.* at 1329.

Thus, in both *Hamm* and *Whatley*, the Circuit Courts of Appeal upheld the terminations of employees with EEO duties after finding that (like Lamar) they were not terminated for what they said, but rather, how they said it -- specifically, in each instance, the employees (like Lamar) failed to follow corporate communication policies and/or management directives. "This, of course, is the unpardonable corporate sin, not going through channels." *Holden v. Owens-Illinois, Inc.*, 793 F.2d 745, 753 (6th Cir.), *cert. denied*, 479 U.S. 1008 (1986).

C. The Petition For Writ Of Certiorari Should Be Denied Because The Eleventh Circuit Decision Does Not Contravene Public Policy.

As a final basis for certiorari review, Lamar argues that "the Eleventh Circuit has concluded that a public manager who has a duty to report on EEO/AA violations and advise management on potential EEO liabilities, such as Lamar, can be fired for insubordination for reporting violations of law." This argument, however, misstates the Eleventh Circuit's holding in that Lamar was fired not for the content of her speech, but rather for the manner, time and place in which she chose to speak.

Although it is well established that a public employer may not retaliate against an employee for speech protected by the First Amendment, the employee's right to free speech is not absolute -- rather, the employee's interest in speaking out must be balanced against the government's legitimate interest in efficient public service. *See Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987); *Connick v. Myers*, 461 U.S. 138, 150-51 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). A governmental body -- as an employer -- enjoys a legitimate interest in promoting efficiency and integrity in the discharge of official duties, and in maintaining proper discipline in the public service. *Connick*, 461 U.S. at 150-151. "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her." *Waters v. Churchill*, 511 U.S. 661, 675 (1994). The public employer need not allow "events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 U.S. at 151-52.

Further, the First Amendment only "assures public employees that they may express their views on issues of public concern without fear of discipline or termination *as long as they do so in an appropriate manner and at an appropriate time and place.*" *Waters*, 511 U.S. at 698 (Stevens, J., dissenting) (emphasis added). "When a government employee personally confronts his immediate supervisor, the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered." *Connick*, 461 U.S. at 152.

In *Holden v. Owens-Illinois, Inc.*, 793 F.2d 745, 751 (6th Cir.), *cert. denied*, 479 U.S. 1008 (1986), a Title VII retaliation case, a manager in charge of the employer's affirmative action program began acting as a compliance officer -- a self-imposed duty that fell outside her job description and was not authorized by her superiors. The appellate court upheld the dismissal of the manager, concluding that "[a]n employee does not receive special protection . . . simply because the employee handles discrimination complaints or works on affirmative action matters." The court in *Holden* reasoned that the employer "was entitled to decide the manner in which the company would implement its affirmative action programs. [It] was not required to accept plaintiff's position that her job included compliance work as well as writing and amending affirmative action plans." *Id.* at 753. *See also Lewis v. Cowen*, 165 F.3d 154, 163 (2d Cir.), *cert. denied*, 528 U.S. 823 (1999) (finding no First Amendment violation for the termination of a state lottery director who disregarded a direct order of his superior regarding a matter that was of public concern, reasoning that the employee had engaged in "a sustained refusal to follow the professional direction of a supervisor in a critical matter.").

In this case, Lamar is, in essence, seeking a ruling from this Court that the First Amendment vests public employees with EEO duties with complete autonomy in determining the content of their employer's official documents and reports. She also argues that such employees are immune under the First Amendment from disciplinary action or dismissal when they deliberately deviate from the employer's policies. As shown above, this is not the law. Indeed, an employee who, like Lamar, "violates legitimate company rules, knowingly disobeys company orders, disrupts the work environment of his employer, or willfully interferes with the attainment of the employer's goals," should not be protected for such conduct simply because he or she is charged with monitoring the employer's affirmative action program. *See Holden*, 793 F.2d at 753.

CONCLUSION

The undisputed material facts below established that Lamar was dismissed from City employment not for what she said, but rather, for admittedly refusing to comply with the clear and lawful directives of her superiors to delete her "dramatic personal commentary" from an official City report. She also continually failed to meet deadlines for work assignments and, after being offered the opportunity to resign, distributed her own version of the City's 1996 Affirmative Action without her supervisors' prior review or approval. Lamar's performance deficiencies continued in spite of progressive discipline and, thus, her employment was properly terminated. These facts clearly compel the conclusion reached by the Eleventh Circuit and distinguish this case from *Johnson*. Further, the Eleventh Circuit has not foreclosed alternative avenues for public employees like Lamar to express their opinions on important public matters.

Instead, it has merely held that such public employees cannot ignore reasonable work rules and lawful management directives in trying to accomplish their personal goals and that the First Amendment does not confer any right to express personal opinions, over management objections, in a public employer's own official reports. Accordingly, the Petition for Writ of Certiorari should be summarily denied.

Respectfully submitted,

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